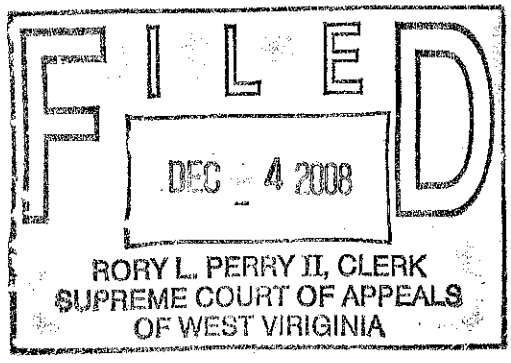
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE ex rel. DANA DECEMBER SMITH,
Appellant,

v.

Supreme Court No: 34155

THOMAS McBRIDE, Warden,
Mt. Olive Correctional Complex,
Appellee.



REPLY OF APPELLANT
TO CORRECTED BRIEF OF APPELLEE

George Castelle, Bar No. 672
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323

M. Timothy Koontz, Bar No. 2089
P.O. Box 2180
186 East Second Avenue
Williamson, WV 25661
(304) 235-2227

Counsel for the Appellant

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INTRODUCTION

In the previous Reply of Appellant, filed November 18, 2008, among other issues the Appellant identified twenty-one erroneous factual assertions that were contained in the State's Brief of Appellee. The State has since filed a corrected Brief of Appellee (as corrected on November 21, 2008).

Although the State corrected some of the erroneous factual assertions in its revised Brief, the State inexplicably left many of the erroneous assertions intact. As a result of the State correcting some errors while leaving others intact, some sections of the Appellant's previously filed Reply Brief are now moot, while other sections are not only not moot but are now more

relevant than ever. Consequently, in response to the State's revised Brief of Appellee, the Appellant submits this revised Reply, in order to delete the moot sections, revise the page references to the original Brief of Appellee to reflect those of the corrected Brief of Appellee, and to address those issues that remain.

The Appellant requests that this revised Reply of Appellant be considered in place of, or as superseding, the Appellant's previously filed Reply.

SUMMARY

The Brief of Appellee (as corrected on November 21, 2008) is erroneous in that (1) the State still misstates much of the evidence in this case and provides cites that do not support its statement of facts or its argument; (2) the State's brief includes an archaic and erroneous standard of review; (3) the State erroneously asserts that violations of rules of court, in habeas proceedings, cannot be appealed; (4) the State's allegation that an assistant public defender provided Tommy Lynn Sells with the information to fabricate his newly-discovered confession is chronologically impossible and is false on its face; (5) the State erroneously asserts that acquittals in other cases based on similar facts cannot be raised in this appeal; (6) the State erroneously asserts that the facts regarding the time of death were fully litigated at trial and are not newly discovered, and (7) the State erroneously asserts that the details of the serial killer's newly discovered confession were commonly known facts rather than obscure details that only the actual killer could know.

I. The Appellee Misstates the Evidence in this Case and Repeatedly Provides Cites That Do Not Support Its Statement of Facts or Its Argument.

Despite making some significant corrections, in the Brief of Appellee (as corrected on November 21, 2008), the State still makes an unusually large number of erroneous assertions about the factual issues that are at the heart of this habeas proceeding.[1] Nine of the erroneous assertions are set forth herein. They include two erroneous statements regarding the time frames bearing on guilt or innocence (part I.A, herein); five erroneous assertions regarding such matters as the Appellant's alleged dishonesty and the alleged inaccuracy of the confession of Tommy Lynn Sells in describing the location of the victims' bodies (part I.B.); and two additional erroneous assertions or erroneous documentation regarding the remaining evidence in this case (footnotes 2 and 3).

A. Erroneous Statements Regarding the Time Frames Bearing on the Appellant's Guilt or Innocence.

Four of the factual errors in the State's original Brief of Appellee involved the witnesses' testimony regarding the crucial time frames bearing on the Appellant's guilt or innocence. In its corrected Brief, the State corrected only two of the four errors regarding the time frame, and for some reason left the following key errors intact.

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[1] Despite the unusually large number of factual errors in the State's brief, throughout its brief the State expresses concern that it was instead the Appellant, in his brief, who both understated the evidence that was presented against him, and overstated the evidence in his favor. Brief of Appellee, 6, 11, 13, 16 and 20. As set forth herein, the assertions in the Appellant's brief are accurately stated and accurately documented. By contrast, as set forth herein, numerous assertions in the State's Brief are erroneously stated and mistakenly documented.

1. Erroneous assertions regarding when Steve Pritt last saw the victims alive.

The trial testimony regarding when the victims were last seen alive is crucial because independent documentation of telephone records confirms that the Appellant had left the area where the crime occurred at a time when at least one witness observed the victims, alive, in the yard outside their home. Trial Tr. 1854-55, 1962, 2360; Kanawha County Sheriff Department Report of Investigation, p. 33.

On page 6 of the corrected Brief of Appellee, as in the original Brief of Appellee, the State creates the false impression that, in the Brief of the Appellant, counsel for the Appellant misled this Court regarding this critical trial testimony about when the victims were last seen alive. As the State writes -- erroneously -- on page 6 of its brief:

> "In his brief to the Court, the Appellant states that Steve Pritt saw the victims in their front yard at 6:00 pm or sometime thereafter. (Appellant's Brief 6, Tr. 2360.) *The defense fails to tell this Court the whole story. In a statement taken by the investigating officers September 12, Mr. Pritt claimed that he had left his house about 5:00 pm.* (Tr. 2361). [emphasis added]

This assertion by the State is totally false. As the Appellant pointed out in his previously filed Reply, Mr. Pritt did not tell the investigating officers that he left his house [and saw the victims alive] at about 5:00 pm. Contrary to the State's assertion, Mr. Pritt, in his September 12 statement, repeatedly stated that the time he left his house and saw the victims alive was about 6:00 pm:

> "probably around six" (Steve Pritt, Sept. 12, 1991, statement, page 7)
>
> "pretty close to 6:00" (Steve Pritt, Sept. 12, 1991, statement, page 8)
>
> "I'd say six" (Steve Pritt, Sept. 12, 1991, statement, page 8)

(The relevant portions of the September 12, 1991, statement of Steve Pritt, are attached hereto as Attachment A.)

The problem with the State's erroneous assertion regarding the time the victims were last seen alive is compounded because the State in its Brief repeats the same erroneous assertion that the prosecutor made at trial -- an assertion that the prosecutor made in an effort to shake the witness's confidence regarding the timing of events. Tr. 2361.

The difference between 5:00 pm and 6:00 pm is critical, because Detective John W. Johnson testified that, according to telephone records, the Appellant made a telephone call from a pay phone in Fosterville, Boone County, at 6:11 pm -- more than a half-hour drive from the victims' home. Trial Tr. 1962; Kanawha County Sheriff Department Report of Investigation, p. 33. Based on Steve Pritt and Detective Johnson's testimony, the Appellant had left the Cabin Creek area at a time when the victims were still alive.

The accuracy of the actual time of 6:00 pm, as set forth in Mr. Pritt's statement of September 12, 1991, is compelling for two reasons. First, it was given by Mr. Pritt within five days of the occurrence, when Mr. Pritt's memory was fresh. Second, Mr. Pritt established the estimated time based on a detailed analysis of his activities that evening, including documented references to specific points in time (such as his purchase of a lottery ticket in the town of Chelyan at 7:00 pm or 7:01 pm). September 12, statement, pages 3 and 8.

For the above reasons, the State's assertion that Mr. Pritt gave investigating officers a time of last seeing the victims alive at 5:00 pm, and the suggestion that the Appellant has misled the Court by stating otherwise, is simply erroneous and should be disregarded.

2. Erroneous statement regarding the last person to see the victims alive.

The State's error in regard to Steve Pritt's statement is also compounded by an additional error regarding when the victims were last seen alive. On page 5 of the State's Brief, the State erroneously describes a neighbor, Dora Back, as the last person to see the victims alive. The State's assertion is erroneous because Dora Back testified that she last saw the victims "exactly at 5:00 o'clock." Tr. 1348. By contrast, as set forth above, in his September 12, 1991, statement, Steve Pritt told the police that he saw the victims at about six o'clock. ("probably around six," statement, p. 7, "pretty close to 6:00," statement, p. 8; "I'd say six," statement, p. 8). Additionally, at trial Steve Pritt once again stated that he last saw the victims "pretty close to six o'clock." Tr. 2359.

As explained above, the difference between 5:00 pm and 6:00 pm is critical, because the Appellant made a telephone call from a pay phone in Fosterville, Boone County, at 6:11 pm, more than a half-hour drive from the victims' home. Trial Tr. 1962; Kanawha County Sheriff Department Report of Investigation, p. 33. Given the travel time involved, the correct testimony among a variety of unrelated witnesses and telephone records consistently supports the Appellant's alibi that he left the Cabin Creek area substantially before the time that the victims were last seen alive, made a phone call from a pay phone in Fosterville, Boone County, at 6:11 pm, Tr. 1962; arrived at Anita McKinney's house in Foster (as distinct from Fosterville) at about 6:30 pm or so, Tr. 2292; left McKinney's house sometime after 7:00 pm, Tr. 2292; and arrived at Jeanette Laws' house, also in Boone County, between 7:30 and 8:00 pm. Tr. 2333; Kanawha County Sheriff Department Report of Investigation, p. 33.

B. Additional Erroneous Assertions Regarding the Record.

In addition to the two erroneous assertions regarding the time frames in this case, the State in its corrected Brief also continues to make numerous other assertions regarding the record that are wholly erroneous, misstated, or are contradicted by the State's own documentation. This list includes:

1. Erroneous assertions regarding the Appellant's alleged dishonesty.

In three places in the State's brief, the State asserts that the Appellant asked his friend Anita McKinney to "lie" for him and tell the police that he was at her house the "entire" weekend:

> "He asked her to lie to the police, saying that he was at her house the *entire* weekend . . . "

Brief of Appellee, page 10. [emphasis added]

> "The Appellant asked Ms. McKinney to tell the investigating officers that he was at her house *all* weekend . . . "

Brief of Appellee, page 19. [emphasis added]

> ". . . he asked Anita McKinney to lie for him by saying he was with her the *entire* weekend."

Brief of Appellee, page 28. [emphasis added]

All of these assertions by the State are erroneous. Contrary to the State's assertions, the word "entire" and the word "all" does not appear anywhere in Ms. McKinney's testimony. The State's fictitious insertions of these words are significant. Ms. McKinney's actual testimony was

that "he asked me if I would tell the police that he was at my house over the weekend, and I told him, sure, no problem, you were here." Tr. 2264.

Rather than being a "lie," as the State characterized it, this request by the Appellant, at least with regard to his presence at Ms. McKinney's house, was to tell the truth. The Appellant was, in fact, at Ms. McKinney's house three times during the weekend, including spending all of Saturday night and all of Sunday evening. Tr. 2253-57 (the first visit); Tr. 2255-61 (the second visit, including spending Saturday night), and Tr. 2261-62 (the third visit, including all of Sunday evening). Despite the State's repeated assertions -- and the fictitious addition of the words "entire" and "all" -- the Appellant's request that Anita McKinney tell the police that he was at her house "over the weekend" was a request to tell the truth.

2. Erroneous assertions about the location of the victims' bodies and the alleged inaccuracy of the confession by Tommy Lynn Sells.

In its attempt to discredit Tommy Lynn Sells' confession, in its brief the State erroneously asserts that Sells inaccurately described the locations where he left the victims' bodies. As the State erroneously states in its brief:

> When asked where he left Ms. Castaneda's body, Sell's answer is vague to the point of being nonsensical: "One of them was in the -- a doorway. The other was like in -- one -- one was in like the kitchen, corner of the kitchen in a doorway -- family room; the other was a little further back."
>
> In fact, Ms. McClain was found in her kitchen, *under a table*, and Ms. Casteneda was found propped up against a chair inside the living room. Neither were found in a doorway.

Brief of Appellee, 31-32. [emphasis added]

Almost none of these statements by the State are correct. Instead, Tommy Lynn Sells' description of the location of the bodies is largely accurate. Contrary to the State's assertion that "Ms. McClain was found in her kitchen, *under a table,*" both Robert McClain, who found the victims, Tr. 1739-40, and the crime scene diagram, State's Trial Exhibit No. 89, Tr. 1845, 2012-13, confirm that Ms. McClain was found -- not under the table -- but *"beside the table."* More significantly, the crime scene diagram confirms that Ms. McClain's feet were *in the doorway* in the corner of the kitchen, precisely where Tommy Lynn Sells described her *("in like the kitchen, corner of the kitchen in a doorway."* Sells deposition, 23. [emphasis added]

3. Erroneous assertion regarding the Appellant's knife.

On page 3 and 4 of the State's Brief, the State asserts, "When Pritt jokingly accused the Appellant of being a narc, the Appellant took the knife out of its sheath and *waived it in Pritt's face."* [emphasis added] Contrary to the State's assertions, nowhere in the transcript is there any reference to the Appellant waiving a knife in Pritt's face. Instead, in the only discussion of this incident on page 2349 of the trial transcript, Steve Pritt describes a far less aggressive incident, in which Pritt testified that, rather than waiving the knife in his face, after pulling his knife, the Appellant "showed me the knife and I examined the knife."

As Pritt testified,

> He pulled the knife and I took the end of the sledge hammer and just pushed the knife away, and called him a dumb ass, and he *showed me the knife and I examined the knife.*

Tr. 2349 [emphasis added]

4. Erroneous assertions regarding Dr. Sopher's testimony as to time of death.

On page 13 of its brief, the State writes that "Contrary to the Appellant's assertions, there is no evidence that Dr. Sopher tailored his testimony to incriminate the Appellant. *He did not state unequivocably that the victims died on Saturday evening.*" The State further asserted, without any citation to the record, that Dr. Sopher merely "told the jury that he *could not rule out the possibility* that the victims died on Saturday evening. " Brief of Appellee, p. 13. [emphasis added]

The State's assertions in its brief is erroneous. At trial Dr. Sopher testified that the medical evidence of the time of death is approximate (in order to justify his change in the time of death after learning that the Appellant wasn't present at that time), but Dr. Sopher then stated, without equivocation, that the police evidence *established* the time of death:

Q: [by the prosecution]: If you learned that the last time the people maybe were seen alive was 5:00 o'clock on Saturday . . . that all contact with them ended at 5:00 o'clock on Saturday . . . would those kinds of facts change your estimate of time?

A: Not only change it, but *that would establish the time of death.*

Tr. 2566. [emphasis added]

Similarly, on cross-examination, Dr. Sopher stated,

A: . . . later information shows that they, in fact, or at least *the police information strongly indicates for sure* that they died 5:00 or 7:00 o'clock Saturday night. . . .

Tr. 2600. [emphasis added]

(In addition, as explained in part I.A., above, the assertions in this testimony that the victims were last seen alive at 5:00 o'clock are also erroneous.)

5. Erroneous assertions regarding the identification of the Appellant.

On Page 12 of its Brief, the State asserts that "Cathy Bragg and Ernest Jarrell testified that they saw a man walking along Cabin Creek the day of the murders. *Both said that the Appellant was wearing a belt with a knife and canteen attached.* Brief of Appellee, p. 12-13, fn. 19. [emphasis added] These references to the witnesses describing the person as "the Appellant" are erroneous. Contrary to the State's assertion, neither of these witnesses could identify the Appellant at all. Cathy Bragg could not identify the person in a photo array. As she testified at trial, " . . . I looked at him, but I didn't remember his features." Tr. 2308. Similarly, Ernest Jarrell couldn't identify the person in a photo array. As he testified at trial, "I didn't see his face. I couldn't recognize him." Tr. 2323.

The identification issues are significant, and the witnesses' inability to identify the person that they saw on Cabin Creek wearing camouflage and military garb is significant, because Tommy Lynn Sells testified that he wore camouflage at the time he was on Cabin Creek. Sept. 29, 2004, Deposition, page 26.

C. Additional Erroneous Assertions Regarding the Record (set forth in footnotes).

In addition to the erroneous assertions set forth above, the State's Brief contains additional erroneous factual statements and erroneously documented assertions. Several of these incorrect assertions, or incorrectly documented assertions, include (1) the erroneous claim that

the victim's T-shirt was recovered from the home where the Appellant resided;[2] and (2) erroneous documentation of the Appellant's "guilt."[3]

II. In Reliance on Archaic Caselaw From the Year 1946, the State Sets Forth an Erroneous Standard of Review.

On page 15 of the State's corrected brief, under the title "Standard of Review," the State quotes outdated principles from the 1946 case of *United States v. Johnson*, 327 U.S. 106, 111 (1946):

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[2] Erroneous claim that the victim's T-shirt was recovered from the home where the Appellant resided. During the time of the victims' deaths, the Appellant lived in West Logan in the home of Marion Walls. Tr. 2418. On pages 11 and 12 of the State's Brief, the State asserts that one of the victims designed T-shirts "identical to the one recovered from Ms. Walls," and that the investigating officers recovered several T-shirts from the victim's home "similar to the one described by Ms. Walls." These statements are both erroneous. The only T-shirt recovered from Ms. Walls' home was identified by Ms. Wall's son as belonging to him, with no connection to the victims, or the victims' home. Tr. 2421-22. (The State may be confusing the Logan County residence of Marion Walls, where the Appellant resided, Tr. 2418, with the Boone County residence of Jeannette Laws, Tr. 2331.)

[3] Erroneous documentation of the Appellant's "guilt". On page 2 of its Brief, the State makes an absolute factual assertion, without qualification, regarding the Appellant's guilt. As the State asserts, "the Appellant murdered 63-year old Margaret McClain and her 36-year-old-daughter Pamela Castaneda by stabbing them to death." The authority that the State then cites for this absolute statement is pages 1668, 1703 and 2519 of the trial transcript.

None of these cites support the State's assertion. The first cite by the State, page 1668, is simply the beginning of the prosecutor's opening statement, where the prosecutor explains the meaning of circumstantial evidence and simply expresses "hope" that at the conclusion of the evidence, the State will have proven its case. The second cite, page 1703, contains nothing more than a description of the victims' family and the town where they lived, with no reference to guilt or innocence at all. The third cite, page 2519, contains the medical examiner's testimony that one of the victims died of stab wounds, with no reference to the Appellant or to his guilt or innocence.

In actuality, as the prosecutor acknowledged in her opening statement, there were no eyewitnesses to the deaths of the victims, Tr. 1668. There were no confessions other than the newly-discovered confession of someone other than the Appellant. Throughout the habeas hearing, the question of who killed the victims was a matter of intense dispute.

> [I]t is not the province of [an appellate court] to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact.

Contrary to this archaic assertion, it is precisely within the appellate court's province to review orders granting or denying motions for a new trial based on the ground that the trial court made erroneous findings of fact. As set forth by the United States Supreme Court in the modern era, after the current rules of procedure were adopted, trial courts' findings of fact are routinely reviewed under the "clearly erroneous" standard. *See, e.g., Anderson v. City of Bessemer*, 470 U.S. 564 (1985).

As set forth in the West Virginia case of *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000) -- which the State even cites in its brief -- not only is such review within the province of the appellate court, but the appellate court has a long-established standard for such review: "In reviewing challenges to findings and rulings made by a circuit court . . . we review the circuit court's underlying factual rulings under a clearly erroneous standard." 207 W.Va. at 643, 535 S.E.2d at 487.

Despite the clear standard of review set forth in *State v. Vance,* Rule 52 of the Rules of Civil Procedure (applicable to habeas proceedings through Rule 10 of the Rules Governing Post-Conviction Habeas Corpus Proceedings), and numerous other modern decisions of this Court, the State quotes further from the 1946 case of *Johnson,* stating:

> While the appellate court may intervene when the findings of fact are wholly unsupported by the evidence, it should never do so where it does not clearly appear that the findings are not supported by *any* evidence.

327 U.S. at 111-12 [emphasis added]

This standard of review, set forth 62 years ago, is in contradiction of modern law, Rule 52 of the Rules of Civil Procedure, and *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000), and should be disregarded.

III. The State Erroneously Asserts That the Appellant's Authenticity Claim Is Not Cognizable in Habeas Corpus.

On pages 26-27 of its corrected brief, the State asserts the unusual claim that the Appellant can not appeal the result of rulings in a habeas hearing if the appeal is based on a violation of court rules during the hearing. As the State argues, "Such claims are not cognizable in habeas corpus. Thus, Appellant's ground for relief is deficient as a matter of law."

In its argument, the State is erroneously setting forth rules regarding *trial* errors (if raised in a habeas hearing), and rules regarding the habeas hearing itself. Ordinarily, to raise *trial* errors in a post-conviction habeas hearing, the errors must rise to a constitutional level. W.Va. Code § 53-4A-1; *State ex rel. Crupe v. Yardley*, 213 W.Va. 335, 338, 582 S.E.2d 782, 785 (2003); *State ex rel. Boso v. Hedrick*, 182 W.Va. 701, 709-10, 391 S.E.2d 614, 622-23 (1990).

This principle, however, doesn't apply to the procedures that are required to be followed in the habeas hearing itself. To hold as the State asserts would mean that the habeas court could violate every Rule of Evidence (including Rule 1 and Rule 1101, which make the Rules of Evidence applicable in habeas proceedings) and could violate every Rule Governing Post-Conviction Habeas Corpus Proceedings (including Rule 10, which makes the Rules of Civil Procedure applicable in habeas proceedings), and the appellant would be without any remedy. Instead, this Court has a long-established history of reversing habeas rulings when the circuit

court fails to follow required, though non-constitutional, habeas procedures. See, e.g., *State v. Nazelrod v. Hun*, 199 W.Va. 582, 486 S.E.2d 322 (1997).

In support of its assertion that non-constitutional rules violations at the habeas hearing cannot be grounds for relief on appeal, the State cites only one case, *State v. Legursky*, 187 W.Va. 607, 420 S.E.2d 743 (1992). This sole case cited by the State does not support the proposition that the State claims it supports. Instead, *Legursky* clearly and unequivocably states, "ordinary *trial* error not involving constitutional dimensions will not be reviewed." 187 W.Va. at 608, 420 S.E.2d at 744 [emphasis added]. *Legursky* says nothing about *habeas* error.

IV. The Allegation That Former Assistant Public Defender Wendy Campbell Provided Sells with a Letter That Gave Sells the facts for His Confession Is Chronologically Impossible And Is False on Its Face.

On page 26 of its corrected brief, the State repeats the unfounded allegations that Tommy Lynn Sells purportedly made in his unauthenticated recantation. One of these allegations is that Sells received a letter from someone in Indiana that provided him with some of the details to fabricate his confession. The State then asserts,

> After he was convicted and sent to death row his then counsel, Terry McDonald, forwarded a letter from Kanawha County Public Defender Wendy Campbell which provided additional details about the murders. Between the two letters, Sells was able to concoct a confession.

Brief of Appellee, 26.

These assertions by the State are totally false. First, on February 16, 2006, the State submitted to the Circuit Court photocopies of the envelopes of correspondence that Sells' received in the Val Verde County Jail. State's Supplemental Discovery, February 16, 2006.

Contrary to the statements in Sell's alleged recantation, none of the correspondence that Sells received was from West Virginia or Indiana. Tr. February 17, 2006, habeas hearing, p. 11.

Additionally, on March 15, 2006, counsel for the Appellant submitted to the Circuit Court a March 14, 2006, letter from the Sheriff of Val Verde County, enclosing a copy of the Correspondence Plan of the Val Verde County Jail. Petitioner's Supplemental Discovery, March 14, 2006. The March 14, 2006, letter from the Sheriff also stated that a review of all envelopes of Sells' incoming and outgoing mail found no correspondence between Sells and anyone in the State of West Virginia or the State of Indiana. Needless to say, no letter from Indiana or West Virginia has ever been produced.

Even more significantly, Tommy Lynn Sells' confession occurred in the Val Verde County Jail in Del Rio, Texas, on April 12, 2000. Former Assistant Public Defender Wendy Campbell's first involvement in this case did not occur until nearly four years later (Order of January 20, 2004, appointing the Kanawha County Public Defender Office to represent the Appellant). Consequently, it is chronologically impossible for Sell's confession to be based on information provided by Ms. Campbell. Needless to say, no such letter from Ms. Campbell (now an Assistant Prosecuting Attorney) has ever been produced.

The allegations in Sells' supposed recantation, and the State's repetition of the allegations, are totally false. In fact, the chronological impossibility of the allegations in the unauthenticated recantation helps to confirm that the recantation is false and should be disregarded.

V. Acquittals in Other Cases, Particularly Those Based on Newly-Discovered Evidence of Confessions by Serial Killers, Are Relevant and Appropriate Matters to Raise in the Appellant's Brief.

One of the factors for determining whether to grant a new trial based on newly discovered evidence is "the evidence must be such as ought to produce an opposite result at a second trial on the merits." *In re: Renewed Investigation of the State Police Crime Laboratory, Serology Division*, 633 S.E.2d 762, 769 (2006); *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979).

In order to determine whether the new evidence should produce an opposite result, a relevant and instructive points will be whether similar evidence in similar cases produced an opposite result. In this regard, similar cases in West Virginia where serial killers (other than Tommy Lynn Sells) confessed, and similar cases in other states, where Tommy Lynn Sells himself confessed, are highly relevant.

Despite the relevance of similar cases to this case, on page 29 of its corrected brief the State asserts that "Appellant's citations [to the Jacob Beard case] and any arguments derived from them should be ignored by this Court and stricken from the Appellant's brief."

Additionally, the State asserts that "This Court has never issued an opinion related to this [Beard] case." Brief of Appellee, 29.

First, the State is incorrect that in its statement that the Court has never issued an opinion related to the *Beard* case. Not only did this Court issue an opinion, *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486 (1995), but the opinion is cited three times in the Appellant's Brief (pages 37, 39 and 41), in addition to being cited in the Table of Authorities. Even more significantly, the opinion is cited for the very relevant proposition contained within it: that a purported

confession by a serial killer is not admissible in the trial of someone else unless it is given under oath and is subject to cross-examination. 194 W.Va. at 748, 461 S.E.2d at 494.

The State is correct in its assertion that the second trial of Jacob Beard, with the admission of the serial killer's confession (and thus an acquittal for Beard), was not the subject of an appeal. The fact that acquittals aren't appealed, however, does not support the State's assertion that they can never be mentioned in appellate arguments and must be stricken from appellants' briefs. The acquittal occurred in circuit court and the Appellant in his brief cited the best record that is available: that is, the circuit court case number and date of acquittal.

Appellate courts are not limited to a consideration of only those matters that have been appealed. If so, appellants could not mention, and appellate court's could not consider, the significance of the numerous post-conviction DNA exonerations that have shaken the criminal justice system in this country in recent years. Furthermore, appellate courts have historically taken notice of occurrences in similar cases on a trial level, even citing such non-legal sources as newspaper articles. Perhaps the most significant examples of trial level occurrences in similar cases, given great weight by an appellate court, can be found in *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the United States Supreme Court, in addressing the abuses that occur in police interrogations at the trial level, cited, among other non-appellate sources, the Los Angeles Times, 384 U.S. at 442 n.3; the New York Times, 384 U.S. at 442 n.3 and 456 n.24; the Los Angeles Bar Bulletin, 384 U.S. at 442 n.3; and even the thirteenth-century Mishneh Torah, 384 U.S. at 459 n.27.

Consequently, the State is erroneous in its assertion that the Appellant's references to the acquittal of Jacob Beard should be ignored by the Court and stricken from the record. Instead,

the *Beard* case is a relevant and instructive example of precisely why the Appellant should receive a new trial.

VI. Dr. Spitz's Habeas Testimony That Dr. Sopher's Altered Time of Death Was "Wrong" Was Based on Newly-Discovered Evidence, And Was Properly Introduced to Corroborate Tommy Lynn Sells' Confession.

At the habeas hearing, the Appellant called Daniel J. Spitz, a leading forensic pathologist. Dr. Spitz testified that, although the estimate of time of death is not an exact science, based on the medical changes in the victims' bodies, Dr. Sopher's estimate of the time of death that he testified to at trial was "wrong," and that Dr. Sopher's original estimate of the time of death ("late Sunday night or early Monday morning") was correct. Habeas Tr. 119, 125.

In its corrected brief the State quotes extensively from Dr. Spitz's *preliminary* testimony, where Dr. Spitz explains that medical examiners, in estimating time of death, sometimes take into consideration information provided by the police, including when the suspected perpetrator was at the scene. Brief of Appellee, 35-36. In quoting Dr. Spitz's testimony, however, the State omits Dr. Spitz conclusion -- and the whole point of Dr. Spitz's testimony regarding police information. The State fails to include Dr. Spitz's testimony that, if the police information about the suspected perpetrator is wrong, "then the conclusions as to the time of death . . . is going to be wrong." Habeas hearing, January 18, 2006, p. 123.

For this reason, the State is erroneous in its assertion that the victims' times of death and Dr. Sopher's altered opinion were fully litigated at trial. Brief of Appellee, 34. The time of death was not fully litigated at trial -- and could not have been fully litigated at trial -- because at the time of trial the confession of Tommy Lynn Sells didn't exist and there was no means of

knowing that there was a suspect other than the Appellant. Dr. Sopher could not be cross-examined at trial about the possibility that someone other than the Appellant killed the victims at a time when the Appellant was not in the vicinity because it was not known that a suspect other than the Appellant even existed.

Furthermore, the Appellant does not base its introduction into evidence of Dr. Spitz's testimony on the assertion that it is newly-discovered evidence, even though some of it is. Dr. Spitz's testimony was introduced, and was argued in the Appellant's brief, as serving to corroborate Tommy Lynn Sells' confession. Dr. Spitz testimony serves to corroborate the confession in that the medical evidence supports a killer other than the Appellant, because the Appellant wasn't present at the crime scene at the most probable time of the victims' deaths.

For both of these reasons -- that Dr. Spitz's testimony was, in fact, based on newly-discovered evidence, and that the testimony was introduced to help corroborate the confession -- the State is erroneous in its argument that the time of death was fully litigated at trial and should not be re-litigated now. Brief of Appellee, 34.

VII. The Name of the Route 60 Lounge Was an Obscure Part of the Appellant's Trial And Received No Media Attention in This Case.

The State erroneously discounts the compelling details contained in Tommy Lynn Sells' confession. For example, in Sells' April 12, 2000, confession, Sells explained that he met the victim, Pamela Castaneda, at the Route 60 Lounge in St. Albans. Sgt. Allen Deposition, Exhibit No. 1. This obscure detail is particularly compelling because the Route 60 Lounge was, in fact, the location where the victim socialized. Trial Tr. 2641.

In the State's effort to discount the uncanny details in Sell's confession, the State refers to the "substantial press attention" the trial received, and states, with no supporting documentation, that "By the time the Appellant's trial was over, it was no secret that Ms. Castaneda sold her t-shirts at the Route 60 Club." Brief of Appellee, p. 21.

In a review of the record, however, it is apparent that the Route 60 Lounge was not a significant part of the Appellant's trial and was rarely mentioned until the last day of trial. To the best of the Appellant's knowledge, and as confirmed by a search of newspaper archives, the Route 60 Lounge was not a subject of any media coverage during the trial. Contrary to the State's assertions, Tommy Lynn Sells' knowledge of the victim socializing at the Route 60 Lounge is compelling evidence that his statements in his confession are accurate.

CONCLUSION

With the State's erroneous assertions removed from consideration, what remains in this case is a newly-discovered confession by a confirmed serial killer. The confession is set forth in uncanny detail, with no plausible explanation for the detail other than that the confession is a valid confession. As such, the confession casts grave doubt upon the murder convictions in this case.

Consequently, the Circuit Court's findings and conclusions are clearly erroneous and should be reversed, and a new trial awarded.

Respectfully submitted,

DANA DECEMBER SMITH,
By counsel

George Castelle, Bar No. 672
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323

M. Timothy Koontz, Bar No. 2089
P.O. Box 2180
186 East Second Avenue
Williamson, WV 25661
(304) 235-2227

Counsel for the Appellant

ATTACHMENT A

Q: And what vehicle was this?
A: The Mercury wagon.

Q: Describe it. What color was it?
A: The white Mercury station wagon.

Q: And what, did they just drive up and turn around and come back out or did they sit a while?
A: No, they just turned around and left.

Q: How long ago was this?
A: Oh, it's probably been six months or better.

Q: Do you know if Dana Smith and Pam were friends or anything?
A: More than likely they were friends...yeah.

Q: Had you seen them together any other time?
A: Not right off hand...no.

Q: Mr. Pritt, is there anything else you would like to add on this statement at this time that I might not have asked you?
A: Going down the road after Dana left, I did see Mrs. McClain and Pam out in the yard...on the way down the holler to...to the store to get my pop. I did see Mrs. McClain and Pam out in the yard. She was in her wheelchair and Pam was...you know...out there with her...they were talking to...what's her name... Shannon...I don't know her last name...but the man that lives next door to them, it's his daughter. They were out in the yard talking to them.

Q: About what time was this?
A: Oh, it was probably about a half hour after Dana left. It was probably around six.

Q: They were out in the yard talking to who?
A: A girl name of Shannon and her boyfriend...I don't know her boyfriend...but I do know Shannon, cause she had a black baby and ...

Q: Where does she live at?
A: I don't know where she lives at now, but her father lives next door to the McClains.

Q: How far away were you when you saw this?
A: Just the road.

Q: Oh, you were coming down the road?
A: Down the road...yes.

Q: Who else was there?
A: Just that boy...they were in a car...I think Shannon, she was in the passenger seat, and I couldn't make out who was in the driver's seat of the Camaro. It was a maroon Camaro with an old faded out paint job and it had a red stripe...a maroon

A: stripe around the bottom. It was about approximately an '84 model Camaro.

Q: You didn't see the driver?
A: No sir.

Q: You say it was painted maroon striped where?
A: Along the bottom...it was like...it was a V-28 Camaro.

Q: And where was this car at?
A: In the alley in front of their house.

Q: And who was talking to 'em?
A: Shannon...well, apparently I...I just caught 'em as I went by, but apparently they were talking to the McClain's.

Q: Did you see the McClain's?
A: They were just out in the yard...you know...I just...

Q: Who was out in the yard?
A: Mrs. McClain and Pamela.

Q: Is there anything else you'd like to add to this statement?
A: Not that I know of right now.

Q: And when was this you saw Mrs. McClain and them out in the yard talking to Shannon?
A: I'd say it was pretty close to 6:00, cause I went down to the station and got me a pop and I went up to my friend's and then we rode out the creek, and it takes approximately thirty minutes to get out the creek and I bought a lottery ticket at 7:00.

Q: So about what time do you think you saw them?
A: I'd say six...we messed around at my friend's there for about ten or fifteen minutes and then we rode out of the holler.

Q: Did you see the McClain vehicle there?
A: I don't recall.

Q: Did you see anybody else with the McClain's, other than Shannon and...
A: Not that I can recall.

Q: This statement you've given on tape, is this the truth to the best of your knowledge?
A: Yes sir.

Q: And do you swear under oath that this is the truth?
A: Yes sir.

THIS COMPLETES THIS STATEMENT; TIME BEING 1:34 P.M., SEPTEMBER 12, 1991.

Certificate of Service

I, George Castelle, do hereby certify that on the 4th day of December, 2008, I delivered a copy of the foregoing Reply of Appellant, by U.S. mail, upon:

Robert D. Goldberg
Office of the Attorney General
1900 Kanawha Blvd E., Bldg 1, Room E-26
Charleston, WV 25305

George Castelle